INFORMATION

For Sir THOMAS NICOLSON *of* TILLICUTRIE,
AGAINST.
The Co-heirs of Carnock, *and their Husbands.*

SIR *Thomas Nicolſon* of *Carnock*, having a deſign to preſerve the memory of his Family, That failzing Heirs Males of his Body, his Eſtate ſhould go to his other Heirs Male. He by a Minute of Contract of Marriage, betwixt him and Lady *Margaret Livingſtoun* his Lady, in the year 1648, Is obliedged, That the Heirs Male procreat of his Body, ſhould ſucceed to all Lands and Summs of Money, which he then had pertaining to him, or which he ſhould thereafter acquire in his Ladys Liferime; And for the better proviſion of the Heirs Female that ſhould be procreat in marriage, failzing of Heirs male of the Marriage. He obleidges his Heirs Male to pay to his ſaids Heirs Female, certain Summs of Money for their Portions, to be divided amongſt them in manner therein mentioned, how ſoon they ſhould attain to ſuch an Age, during which time he obleidges himſelf and his Heirs Male to entertain the ſaid Daughters in Bed, Board, and other neceſſarys, according to their Quality, and obliedges his Heirs Male to warrand the Lands provided to his Lady in Liferent, to be free of all Inconveniencies whatſoever; And oblidges his Lady to be comptable, and pay to his Heirs Male what the Lands ſhould pay, and be of more worth than 4000 Merks yearly, and that the Minute ſhould be extended in ample Form, by Advice of Men of Judgement.

There being a Son and three Daughters of that Marriage, *Viz.* Sir *Thomas*, *Helen*, *Iſobel*, and *Margaret Nicolſons*, and Sir *Thomas* having only one Son, who thereafter came to be Lord *Neaper*; And he having dyed young, without Children, the ſaid *Helen Iſobel* and *Margaret Nicolſons*, his Aunts, pretending that the Eſtate did belong to Heirs whatſoever, & they being ſerved Heirs of Line to Sir *Tho.* who was Lord *Naper*, and the ſaid Daughters, and *Grethock Inverum*, and *Ballancreif* the Husbands, having raiſed a declarator againſt Sir *Thomas Nicolſon* of *Tillicoultrey* the Heir Male, for declaring that they had Right ro the Eſtate, and that there was no clauſe in the foreſaid Minute, providing the Eſtate to the Heirs Male, Failzing the Heirs Male of Sir *Thomas* his own Body: And if any ſuch thing were imported by the ſaid Minute, It was void and null, as being done by a Minor, having Curators and without their conſent; And *Tilicoultrie* being ſerved general Heir Male to the Lord *Neaper*, he raiſed a Reduction, Improbation, and Declarator againſt the ſaids three Siſters and their Husbands for reducing of the Rights, and declaring he had the only Right to the ſaid Eſtate as Heir Male, which Declarator was founded upon the foreſaid Minute of Contract of Marriage, and an Bond of proviſion granted be Sir *Thomas* to his ſaids three Daughters for their portions, and repeated the ſame be way of defence, and the Lords of Seſſion by the pretended Decreet, alledged to be obtained in the year found and declared that there was no alteration or change of the ſucceſſors, or any oblidgement for alteration or change of ſucceſſion, and former ſettlement of the Eſtate to Heirs whatſoever, from the ſaids Heirs whatſoever to the Heirs Male, either expreſt or imported by the foreſaid Minute of Contract, or by the Bond of proviſion granted be Sir *Thomas*, to his ſaids Daughters, and declared, That Sir *Thomas* was Minor the time of entering into the Contract, and that without conſent of his Curators, and ſo was null; By which *Tillicultrey* conceaving himſelf to be extreamly læſed. He conform to the Liberty granted to him be the claim of Right, proteſted for Remed of Law to the King and Parliament, and he now inſiſts for reducing of the ſaid Decreet before the Parliament, upon theſe Reaſons;

Firſt, That the ſaid Decreet is *ipſo jure null*, as not being recorded, nor to be found in the Book of Regiſters, *2do.* Albeit it had been recorded, Yet the ſaid pretended Decreet ought to be reduced, becauſe upon the Matter, it was but in abſence; For albeit it bears *Tillicultrey* to be Compearing, yet the pretended Debate in the Decreet was adviſed, and Interloqutor paſt in Abſence, as appears by a Petition given by the Siſters, upon which there is an Interloqutor, Declaring, That the Lords would adviſe the Proceſs, albeit the Defender

Tender were abſent, and accordingly the Proceſs was adviſed, and Interloqutor upon the Import of the Minute of Contract was paſt at that time when the Defender was abſent, and no Informations given for him in Relation to the ſamen.

3*tio*. The Lords of Seſſion Repelled theſe moſt Juſt defences, which were alledged for *Tilicultrey*. *Firſt*, That the foreſaid Minute of Contract did import a Tailzie in favours of the Heirs Male, Failzing Heirs Male of his own Body, which was clearly evinced from theſe grounds. *Firſt*, That by the Minute he is oblidged to Infeft his Lady to be holden of his Heirs Male in the general. 2*do*. He oblidges himſelf, his Heirs Male, Tailzie and proviſion to warand his Ladies Liferent. 3*tio*. He oblidges his Lady to be Comptable to his Heirs Male for what the Lands ſhall be more worth then 4000 Merks of Annuitie, to which ſhe was provided. 3*to*. He oblidges himſelf, his Heirs Male, and Succeſſors whatſoever, Failzing of Heirs Male of the Marriage to pay the proviſions condiſcended upon to the Heirs Male of the Marriage, when they come to a certain age. 5*to*. He oblidges his Heir Male and Aſſignies whatſoever, to entertain the Daughters till they came to that Age, By all which the Heirs Male are actually ſecured, and the Heirs Famale excluded, for if it had been deſigned that they ſhould have ſucceeded, why ſhould Portions have been provided to them? And if it had not been deſigned that the Eſtate ſhould not go to the Heirs Male, why ſhould they have been oblidged to pay the Daughters Portions, and to warrand the Ladies Joyntute, and the Lady to be comptable to them for the Superplus yearly Rent more then payed her Annuitie? 6*to*. Sir *Thomas* was ſo firmly reſolved that the Eſtate ſhould go to his Heirs Male,. that many years thereafter when he was above forty years of Age, he gave a Bond of proviſion to his ſaids three Daughters, by which he did appoint his ſon, and thoſe who ſhould happen to ſucceed to his Eſtate, that they ſhould fulfill the ſaids Bonds of Proviſion, as they would expect the Lords Bleſſing, and recommends to the Lords of Seſſion to ſee the ſaids Bonds fulfilled. 7*mo*. As a convincing demonſtration, that all people did Look upon the Eſtate to be provided to the Heirs Male be the foreſaid Contract, Failzing Heirs Male of Sir *Thomas* own Body, the ſaid Sir *Thomas*, the ſon Brother to the ſaids three Siſters, with conſent of his Curators and Friends both on the father and Mother ſide, did after his Father Deceaſe gave bonds to his ſiſters by which he oblidged himſelf and his Heirs Male, to pay them their proviſions, appointed them be the father and the ſaids ſiſters were Married, as having right to theſe proviſions without having the leaſt expectation or hope of ſucceſſion to the eſtate: And the husbands were ſatisfied with theſe portions, and provided their Ladies with ſuitable jointures accordingly. 8*vo*. The Minute of Contract bearing an expreſs oblidgement, that the ſamen ſhould be extended in ample form by advice of men of Judgement. Now is it not obvious to comon reaſon, that if any Lawyers or Men of Judgement had been adviſed at that time in relation to the extending of that minute, that they would have adviſed as the true meaning of the minute, that the eſtate ſhould be provided to the other Heirs Male failzing the Heirs Male of Sir *Thomas* his own Body, as being not only Sir *Thomas* his intereſt ſo to do, as it is the Intereſt of all perſons, who deſignes to preſerve the memory of their familie; But likewiſe as being founded upon the expreſs words and meaning of the Contract.

4*to*. As it is moſt manifeſt and clear as the Suns light in the Mid-day, that by the foreſaid minute of Contract, It was Sir *Thomas* his meaning that the eſtate ſhould go to his other Heirs Male failzing Heirs Male of his own body, and that all perſons underſtood it ſo, And that therefore *Tillicoultries* defences founded upon the ſaid Contract, and other writes produced ſhould not have been repelled. So, Likewiſe, Theſe Anſwers to the purſuers pretended reaſon of Minority upon which they quarrelled the ſaid Contract were moſt Unanſwerably relevent. For *firſt*, There is nothing produced to Inſtruct Sir *Thomas* his age, but, an extract of his Baptiſm, which is not ſufficient probation, & even conform to that declaration, it appears that Sir *Thomas* was *majoritate*; *proximus* & within very few moneths of his Majority, 2*do*. If Sir *Thomas* had been Minor at that time, it is not to be Imagined he had Curators otherwayes they would have been ſubſcriving, Eſpecially ſo ſolemn a deed as a Contract of Marriage. 3*tio*. If Sir *Thomas* had had Curators, It is not to be imagined that his Lady and her Friends would have entred in that Contract without their conſent, or at leaſt would thereafter have procured their Approbation, and they certainly have gotten the Contract corroborat by a ſeparat deed. 4*to*. The pretended

Extract

Extract of the Act of Curatory by the Commiſſars of *Edinburgh* produced, is *ipſo jure nuil*, as being without any Warrant, there being no warrant for it amongſt the Records of the Court; And it is a Rule in our Law and clear by our deciſions, that Extracts of Acts of Curatory before inferior Courts makes no faith, unleſs the ſubſcrived warrand thereof by the Partie be produced, & particularly in the caſe of *Porterfield contra Hamiltoun* in the year . . . 5*to*. Albeit Sir *Thomas* had been Minor, and had Curators the time when he entered into the ſaid Contract, both which were denyed, yet the Contract could not be queſtioned upon that Ground at the inſtance of the Heirs of Lyne; Becauſe there is two things to be proven in order to the Annualling of deeds done by a Minor. *viz*. That he was Minor, and that he was leſed, ſo that every deed done by a Minor is not null unleſs Leſion be inſtructed, as is clear from the Edict of the Pretor in the Civil Law: *Tit*: *de Minoribus quod cum Minore geſtum eſſe dicetur, utique res erat anima advertam*; As if he had ſaid that if every Deed done by a Minor is not to be quarrelled upon the ground of Minoritie, but the Pretor will conſider what deeds ſhall be annulled and what not, and if there be no Leſion in the caſe, the deed cannot be queſtioned: *Leg*; 5; *Cod*: *De integrum Reſtitut*: *Minor*: *Minoribus in integrum Reſtitutio competit in quibus ſe captus probare poſſunt*, And *Leg*: 9: *ff*: *De jure jurando*: *par*: 4: *Sed plerumque ipſum Prætorem debere cognoſcere, an Captus ſit Minor & ſic in integrum reſtituere nec enim, utique qui Minor eſt ſtatim & circumſcriptum ſe docuit*. And there is an excellent Reaſon given for it, *Leg*, 24 *par*: 1. *ff*. *minor de non ſemper autem ea quæ cum minoribus geruntur reſcindenda ſunt ne magno incommodo hujus ætatis homines, adficiantur, nemine cum bis contrahente, & quodammode commercio eis interdicetur, itaque niſi aut manifeſta circumſcriptio ſit, aut tam negligenter in ea cauſa verſati ſunt, Prætor interponere ſe non debet*; And that Sir *Thomas* was not leſed in providing the eſtate to his other Heirs Male failzing of Heirs Male of his own body by the foreſaid Contract is evinced from theſe reaſons. *firſt*, That it was a juſt and rational Act for the preſerving of the memory of his familie, and when a minor does juſt and rational Acts they cannot be queſtioned neither by him nor his Succeſſors, which is not only clear from the foreſaid texts in the Civil Law. But our own Law, and was ſo found by a ſolemn Deciſion in *January* 1668 *Nicolſon contra Nicolſons*. 2*do*. When a Minor does ſuch a Deed which is ordinarly in uſe to be done, by moſt prudent and provident men, and allowed be the Law, He cannot be ſaid to be Leſed nor can the Deed be quarrelled, either by himſelf or his Heirs *ſi minor jure communi uſus ſit non poteſt, videri circumventus, Leg*: *Ult*: *Cod*: *de integrum reſtitut*: *Minor*: And *Leg*: 116. *De regul*: *jur*: *non capitur qui jus publicum ſequitur*. But ſo it is, That a Minors Tailzing his Eſtate to his other Heirs Male failzing of Heirs Male of his own Body, is ſuch a Deed that is ordinarly in uſe to be done by the moſt wiſe and prudent men, for the preſerving of the memory of their Names and Familys, and is allowed be the Laws of the Nation, and ſo cannot be quarrelled upon the account of Leſion. 3*tio*. What is underſtood to be Leſion in the Caſe of Deeds done be a Minor, upon which he and his Succeſſors may be reſtored, is excellently well defyned by the Law 44. *ff*, *de Minor*, *Non omnia quæ minores annis viginti quinque gerunt, irrita ſunt, ſed ea tantum, quæ cauſa cognita, ejusmodi deprehenſi ſunt; ut, ſi ab aliis circumventi, vel ſua facilitate decepti aut quod habuerunt, amiſerunt; aut ſe oneri quod non ſuſcipere licuit, obligaverunt*. By which it is evident, That in theſe five caſes only a Minor can be ſaid to be leſed by a Deed, *Firſt*, If he be fraudulently circumveened. 2*do*. If through weakneſs of Judgement he be deceived, 3*tio*, if thereby he looſes that which he had and diminiſhes his Eſtate. 4*to*. That he omitt to acquire ſome Emoluments that he might have gotten. 5*to*. That he ſubject himſelf to ſome burden, that he ought not to have undertaken; But ſo it is, that he tailzing of his Eſtate to his Heirs Male can fall under none of theſe caſes, and therefore cannot be quarrelled upon leſion, And 4*to*. That which ought to have very great weight & clear the whole affair is the Bond of proviſion granted be Sir *Thomas* to his Daughters the Purſuers, by which he obliges his Son, and thoſe who ſhould ſucceed to him in his Eſtate to pay their Portions; which clearly demonſtrates that in caſe of Deceaſe of his Son, there was others to ſucceed to him in his Eſtate then his Daughters which could be underſtood of none but his other Heirs Male, ſeeing the Bond could not be conſiſtent with it ſelf, if he had meaned that the Daughters ſhould be lyable for the Portions, ſeeing they could not be both the perſons obliged to pay the Portions, and the perſons who were to receive the ſame; And therefore that clauſe in the Bond re-

lating to theſe that ſhould ſucceed to his Eſtate, muſt neceſſarly be underſtood of his other Heirs Male, and to ſhew his *enixa voluntas*, that it ſhould be ſo, he requires them by a ſolemn obteſtation, that they would fulfil the ſaids Bonds as they expected GODS Bleſſing, and there is ſo much the greater obligation lying upon the Judges to ſee his will obſerved, ſeeing by the ſame Bond he recommends to the Judges, to ſee it fulfilled. Now it can never be ſincerely fulfilled, unleſs it be ſtrictly obſerved according to the Fathers true meaning, which was, that his Familie and Eſtate ſhould be preſerved in his Heirs Male, and his Daughters ſhould have their Portions, So that *Tillicultrie* being the true and leaneal Heir Male to that great and eminent Lawyer, Sir *Thomas Nicolſon*, who was an Honour to his Nation, whoſe Name and Familie may be preſerved in *Tillicultries* perſon, he being his Grand Child, and the fifth Sir *Thomas Nicolſon* of that Familie; whereas the name & Familie would abſolutely extinguiſh & perriſh, if the Eſtate go to the Daughters. It is moſt agreeable to Law, Reaſon & Equity, that the Eſtate ſhould belong to him, and his Right to the ſamen declared. *6to* The Lords by their Interloqutor the 22 *January* 1691; Declares that they have no regard to the defence founded upon the death of the Curators *ſine quibus non* the time of the Minute by which the Act of Curatorie, became void and null and ſo it was in the caſe as if Sir *Thomas* had no Curators, In reſpect as the Interloqutors bears, it was Nottour that two of them was then alive, whereas the pretendit notarietie of a thing that was alledged to be extant many years before, could be no ground of an Interloquitor unleſs the ſamen had been inſtructed by a Legal probation. *7mo.* By the Interloquitor the 9*th January*, 1691 the Lords finds that there is no neceſſity for aducing any furder probation by witneſs of Sir *Thomas* minoritie, the matter being ſo ancient, that witneſſes could not be found to depone there anent, which clearly makes appear that Lords were convinced there was no ſufficient probaition aduced by the Heirs of Lyne, of Sir *Thomas* his minority, the time he entered into the minute of Contract of Marriage, and that being laid down as a ground, It was incongruous to find that there was no neceſſity for aducing of farder probation upon the accompt that the matter was ancient for the antiquity of the thing doeth not free any partie from a Legal probation: And therefore the foreſaid Decreet and Interloquitor, upon which the ſamen proceeded, ought to be reduced, and *Tillicultries* Right to the Eſtate ought to be declared for the reaſons above mentioned, eſpecially ſeeing if need were, it can be made appear *per membra curiæ*, that when the firſt Interloquitor was paſt, which is the Foundation of the Decreet, the Lords were much devided in the matter; and the Votes being near equal, it was only caſten and determined againſt *Tillicultrie* by one Vote; And ſeeing there was ſo many of the Lords againſt it, and theſe of the moſt eminent Lawyers upon the Bench, the Interloquitors, which are the grounds of the ſaid Decreet ought to have the leſs weight with the Parliament.

IT was anſwered for the Co-Heirs and their Husbands; *1mo.* The foreſaid Clauſe in the minute of Contract, in Relation to the Heirs Male cannot be underſtood to be Equivalent to a Tailzie of the Eſtate to the Heirs Male, ſeeing in ſeveral other clauſes, the Heirs Male are not mentioned ſolly; But the Heirs Male and Succeſſors which may comprehend the Heirs of Lyne; And as to that Clauſe, in Relation to the payment to the Daughters of their portions at a certain Age, and that his Heirs Male in the mean time ſhould entertain them, muſt be properly underſtood of the Heirs Male of an other Marriage; And the Band of proviſion granted be Sir *Thomas* to the Purluer his Daughters, after his Majoritie could be no evidence of his deſign of providing the Eſtate to his other Heirs Male, becauſe he had a Son than alive; And Tailzies cannot be made by Inferences and Conjectures, but by expreſs deeds. And that Clauſe by which Sir *Thomas* was oblieged to extend the minute, by advice of Men of Law and Judgement, cannot import that the minute was to be extended in Favours of his other Heirs Male, but only that it ſhould be more fully extended in more ample Form, keeping the ſame Terms.

2do. Albeit the ſaid Minute ſhould import a Tailzie to the other Heirs Male as it does not; Yet is is *ipſo Jure null*, as being entered into by a Minor having Curators, and without their Conſent, and ſuch deeds done by Minors, are Null, albeit there be no Leſion in the Caſe, and being *ipſo jure null* by our Law, and the common Law, *Leg:* 3. *God: de in integrum reſtitut* Minor ſuch deeds needs not be revocked or Reduced *intra Annos utiles*, and the Laws Cited for *Tillicultrie* are only in the Caſe of deeds done by Minors having Curators, and the Eſtate

Eſtate by the Ancient Rights being provided to the Heirs whatſomever; It was a kind of Alienation to provide it to the Heirs Male, and a Minor cannot alienat, eſpecially without conſent of his Curators.

As to the firſt, It was Replyed for *Tillicultrie.* 1*mo.* That the Minute was opponed; And it evidently appears by the whole Tenor of it, that Sir *Thomas* deſigned to provide his Eſtate to the other Heirs *Male*, Failzing the Heirs Male of his own Body, and particularly from that Clauſe by which he obliges his Heirs *Male* and Succeſſors to pay the portions to the Heirs Female, and his Heirs *Male* whatſomever, ſhall be oblidged to entertain the Heirs Female before their Portions were payable, which in no ſenſe can admit of any other conſtruction, but that the Eſtate was to go to the Heirs *Male* whatſomever, who were to pay the Daughters Portions, It being altogether inconſiſtent, that Clauſe could be underſtood of the Heirs whatſomever, ſeeing the Daughters could not be oblidged to pay the Portions to themſelves. And it was frivolous to pretend, That the Heirs Male therein mentioned ſhould be underſtood the Heirs Male of another Marriage, that being expreſly contrare to the Clauſe in the Contract, which mentions Heirs *Male* whatſomever, and ſo muſt be underſtood of the Heirs Male in general, and not of the Heirs *Male* of another *Marriage* only: And if there were any Ambiguity or Doubtfulneſs in the Caſe, as there is not; Yet it is a principle in Law, That, *Ex contextu verborum totius ſcripturæ teſtamenti colli teſtatoris, voluntatem*; That in caſe of a dubious clauſe in a Teſtament, or Diſpoſition, the whole tenor of the Write is to be conſidered, and it evidently appears all along in this Minute, That as the Heirs male were obliged to perform the Proviſions in the minute, ſo they were to enjoy his Eſtate.

2*do.* The Bond of Proviſion in favours of the Daughters is a clear Confirmation of Sir *Thomas* his continuing in his deſign to provide the Eſtate to his other Heirs *Male* albeit he had a Son, Becauſe he does not oblige the Heirs male of the marriage to pay the Portions, but he obliges his Heirs aad Succeſſors in his Lands and Eſtate in the general, which clearly imports that the Daughters were not the perſons to ſucceed, but that his other *Heirs* Male by the foreſaid Contract were to ſucceed, and that they were to pay the Portions.

3*tio.* By the common Law and Laws of other Nations; *Tacite Obligationes* are als binding, and Rights may be conveyed thereby, as well as by expreſs Diſpoſitions, as is cleat from the Lawyers that has written *De taciris & ambiguis contractibus, & de conjecturis ultimarum voluntatum*, And this may be farder cleared from many inſtances out of our own Law & practice; & particularly if a man take a Woodſet to himſelf, & his Heirs of Tailzie, & thereafter acquire the Reverſion to his Heirs indefinitly, though in Law this Reverſion ſhould deſcend to the Heirs whatſomever; Yet the Lords of Seſſion by a juſt interpretation, make it deſcend to the Heirs of Tailzie, becauſe it is not reaſonable, to think that the Acquirer would have given the Wodſet to the one, and the Reverſion to the other Heirs; And as a Wife being Heretrix of a Woodſet, and thereafter ſhe & her Husband acquires the Reverſion to them and their Heirs, this Reverſion will not go to the Heirs whatſomever of the Husband, according to the Ordinary Legal Succeſſion, but will deſcend to the Wifes Heirs, who is Heretrix of the Lands; and thouſand inſtances more of that nature may be given whereby conjectures, and neceſſary inferrences; The Rights of the Lands may be conveyed, and it was ſo found by a ſolemn deciſion of the Lords of Seſſion, in the caſe of

where a Father having three ſons, and the eldeſt being dumb, he diſponed the Eſtate to a ſecond ſon and his Heirs, which Failzing to return to the Fathers Heirs, allowing the eldeſt ſon an Annuity yearly, during his lifetime; only & the ſecond Son having dyed without Heirs *Male* of his own Body, albeit be the ordinary courſe of Succeſſion, the Eſtate ſhould have returned to the eldeſt Son, who albeit he was Dumb, he might have Married, and had Heirs of his own Body; Yet ſeeing it appears to be the deſigne of the Father, That the eldeſt Son ſhould be excluded, the Lords from the Fathers preſumed Will, and that the Eſtate ſhould deſcend to the third Son, and there is much more in the foreſaid Minute of Contract, which imports a Tailzie to the Heirs *Male*; Then there was in the foreſaid caſe to exclude the Eldeſt Son and his Succeſſion.

4*to.* By the Ancient Feudal Law, all Lands deſcend only to the Heirs Male, and the Heirs Female did not ſucceed, So that when any doubtfulneſs ariſes, in relation to a Tailzie; the preſumprion lyes alwayes for the Heirs Male, according to the Ancient Feudal Law, and when there ariſes any doubt anent what was the Intention of a party granting of a Right of his Lands, That is alwayes to be underſtood to be the partys meaning, that tends to the preſervation of his Family, and continuing the Eſtate in his Name, as is clear from *Mantica de conject: ultimar: volunt: lib: 6. tit:* 15. Who treats fully upon that Subject, and is poſitive, That *expreſſio generis maſculini facit preſumi mentem teſtatoris talem eſſe, ut voluerit bona in agnatione conſervare*, and *lib: 7. tit: 1. num: 44. Sed etſi in dubio, ſit pronunciandum non ſubeſſe fidei commiſſum quoties tamen relictum, eſt favore conſervandi agnationis procul dubio cenſetur favorabile, & pro eo tanquam benignior ſententia ferenda eſt*; Which is juſt the Caſe in Queſtion, and determined in favours of *Tillicoultrey*, by the moſt Eminent Lawyers that ever wrote upon that Subject.

5to. The minute being to be extended according to the Advice of men of Law and Jugdement; It is evident to all Mens Conviction that reads the minute, That Sir *Thomas* designed the Estate to go to his other Heirs male, failzing of the *Heirs* Male of his own Body: And there is no Lawyer or Writer, but would have extended it after that manner. And it is a principle in Law, that *ubi abreviatura extendenda est secundum sensum sapientis*, It ought to be extended according to these Rules. *First*, It is considered what it appears to have been the meaning of the Party, for the design and meaning of Parties is, *regula regulans* in all Contracts. 2do. That which was fittest for the Interest of the Partie, and that which probably himself would have resolved, if the Question had been put to him. 3tio. It is considered, what the wisest men of the place where the Contracter lived, would do in their own Affairs. And according to all these Rules, It cannot be denyed. but that this minute should be extended in favours of the Heirs male, for certainly it was fittest for the Interest of the Contracter, to have his Name and *Memory* continued; And no man would ever have designed his Estate to be divided amongst his Daughters, when he had a Brother, without appointing one of the Daughters to represent him, by succeeding without division, and assuming the Name and Arms, as is ordinarly done in such Cases, where the Estate is designed to go to the Heirs whatsomever.

2do. As to the other point, in relation to the Minority; It is Replyed, 1mo. Adhering to the former Objections, That the Minority was not sufficiently proven, & that the Warrand of the Act of Curatory is not produced, and that the Discharge and Factory alleadged upon, granted be Sir *Thomas*, with consent of some of his Curators, cannot be sustained to administrate the samen, Becaus the said Factory and Discharge, is only subscrived be some of his Curators, Whereas there not being a *quorum*, named in the Act of Curatory, by decease of any one of them, at least of the Major Part, the Curatory became null; And it will not be made appear that the major Part were alive the time of the entry into the said Minute. But *Esto*, That Sir *Thomas* had been *Minor*, and that the major part of his Curators had been then alive, yet the Contract cannot be questioned upon minority, seeing there was no Leision in the Case, and the forecited Laws are general and positive, That no Deed done be a minor, can be quarrelled upon minority, unless there be Leison, and that without distinction whether the Deed done be a minor, be with, or without consent of his Curators, and, *non est distinguendum ubi lex non distinguit*. And this is farder cleared from the Common Law, *Leg: 101. ff. De verbor: obligat: puberes sine Curatoribus suis possunt ex stipulatu obligari*; So that if minors without consent of their Curators, can be obleidged by formal Stipulations, much more by Contracts when they are not Lesed.

2do. If a Deed done by *Minor* having Curators, without their consent, could be quarrelled upon that Ground: Yet if it be not quarrelled by the minor, *intra annos utiles*, before he be twenty five years of Age, it is understood in Law to be a valied Deed, and cannot be thereafter questioned. And as to the *Lex 3. Cod: de in integrum restitut: minor:* From which it is alleadged to be inferred, That be the Common Law, and our Law, Deeds done by a *Minor* having Curators without their consent, are so null, that the minor needs not be restored against them. It is answered, *First*, That the said Law cannot take place in this Case, because it is expresly in relation to Contracts, by which the minors Goods are alienate, and an Alienation presupposes Lesion; But in this Case there is no Alienation; For by the foresaid Tailzie, Sir *Thomas* did not alienat his Estate to them, But being to his Heirs *Male*, was for the preservation of his Name & Family. And it is the Opinion of all Lawyers that has written upon that Law, that Deeds done by *Minors* having Curators without their consent, cannot be quarrelled, *nisi conditionem suam fecerat deteriorem*, That he put himself in a worse condition by the Deed, but it cannot be said, That the Tailzing of his Estate to his Heirs *Male*, by which his Name and Family may be preserved, and failzing of them to his Heirs whatsomever, to have made his Estate in a worse condition, but rather in a better, & was a just and rational deed which ordinarly most prudent Men uses to do, which is not the case of the above cited; But the *Lawyers* that has written upon the samen, and particularlie that Eminent Lawer *Mornacius* upon the foresaid ninth *Law* of the *Cod: de integram: restitut:* Who is expres that the meaning of the Law is, *Si minor fecit quod quilibet diligens fecerit*, And concludes his Observations upon that *Law*, that a Minor is not to be restored *Si jure communi usus sit, id est eo jure quo & bene consulti Majores agere consueverunt.* And it was the decision of a famous Court, that a Testament made be a furious person was sustained because it was rational; And it was the saying of *Valerius Maximus*, That it is more to be considered, *quod scripsit quam quis scripsit*, much more ought such a Deed as this be sustained, being done by a *Minor* who was *majoritate proximus*, and by a solemn Contract of Marriage, and by a person who was most prudent and provident in all his Affairs. 2do. Giving and not granting, that be the Civil Law, Deeds

done

done be Minors having Curators without their consent were Null, albeit the Minor had not pursued to be restored against the samen in his own time, yet that was only but a subtility in the Civil Law, which be the custom of Nations are not now in use, such as the formalities of Stipulations, and the solemnities of Testaments; The Law of Nations now considering the Justice of the Thing more than Formalities and Subtilities: And therefore it is the Opinion of Lawyers, That the said *Lex* 3. doth not now take place be the Law of Nations. And particularly, *de Ferrier*, in his *Juris Prudens* upon the *Cod.* and that Tittle, *si Tutor vel Curator invertinerit*, who is expres, That by the Laws and Customs of *France*, Contracts entered into by Minors, having Curators, and without their consent are valide in Law, unless the Minor pursue to be restored again the samen in due time.

3*tio*. The Parliament may be pleased to consider that there is many Noble Families in the Nation, whose Right of Tailzie is founded upon Contracts of Marriages entered into by Minors, and if such Contracts as these should be quarrelled upon Minority; It might be a means to unhinge the settlemens of many Noblemen and Gentlemens Estates.

4*to*. As *Tillicultry* is well founded both in Law and Justice upon the Grounds and Reasons abovementioned, So he has all the Favour in the World on his side; For first, He is the undoubted Heir Male, and he having Right to the Estate, he preserves the Name and Memorie of the Familie, and he is content for the better preservation of the Estate, if it should be thought necessary that there shall be an Tailzie thereof with strict Clauses irritant, that hereafter it shal neither be in his power or his successors to put away that Estate; Nixt, he is als near of degree to the *Comunis stipes*, *Viz.* Sir *Thomas Nicolson* who was so Eminent a Lawyer, and who first acquired the Estate, as the Co-heirs are, and *in pari casu*, the Male should alwayes be preferred to the Female. 3*tio*. The Co-Heirs has already gotten their Portions, and was settled in Marriage with respect to their Portions they had, without regard to any expectation they could have of the Estate, and are aboundantly provided; whereas *Tillicultrie* the Heir Male is in a most necessitous condition, having nothing whereupon to live; & it were hard, that the Co-heirs should come in and carry away the whole Estate, and that *Tillicultrie* who is the Heir Male, and has so good Right to the Estate, and ought to represent the Familie should have nothing but be ablolutely miserable; And albeit *Tillicultrie* conceives himself to be sufficiently secured both in point of Law, Justice and Favour; Yet to shew how ready he is to comply with any thing that is reasonable, He is content to make a Judicial Submission to the Parliament, providing the Co-Heirs will do the like; That his Grace his Majesties High Commissioner, and the Honourable Estates of Parliament may do in the matter as they shall think just and equitable, which if the Co-Heirs shall refuse, Then *Tillicultrie* humbly desires that the Parliament in advising the debate, may consider the points separatly, and to give distinct Interlocutors, first upon the import of the contract, and nixt upon the Minority: And if any difficulty remain, as to the declaring of *Tillicultries* Right to the Estate, as he conceives there will be none; He Humbly desires a hearing in plain Parliament upon the whole matter.

Information
The Laird of [illegible]
Agt
The Bairns of Carnock